

# Safeguarding Democratic Institutions

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A discussion of courts and populism begs for definitional boundaries. While courts are generally institutionally confined, the same cannot be said for populism, a political moniker that risks confounding everything from the majoritarian core of democracy to the demagogic claims of tyrants in the making.

As difficult as precise definition might be, it is clear that there is a shift in democratic politics. The post-WW II political parties of Western Europe are in serious disrepair and the political tones in the Netherlands, France, Italy, Denmark, and other nations, are being defined by a politics of anger surging on the left and the right. Meanwhile, Britain voted Brexit over the opposition of every established political party, and the recent American presidential campaign featured a Democratic challenger who pointedly never joined that party, and a Republican candidate (and now president) who had only a fleeting and tenuous tie to the Republican Party.

When everyone knows what is happening, and definitions are elusive, it is tempting to fall back on the jurisprudence of, "I know it, when I see it." But some features are critical, even if imprecise. As Jan-Werner Müller addresses in his book on the subject, the new populism begins with hostility to pluralism. There is a claim to speak for a unified people, fighting against elites whose illegitimacy is a source of great anger. The impulse toward what Nancy Rosenblum terms "holism" challenges the concept of institutional accommodation that underlies constitutional democracy. A monist commitment to an abiding truth that captures the interests of all the people (save the unredeemable outliers) cannot commit to the rotation in office, the ability of those on the outside today to emerge triumphant tomorrow, and then to see the process reverse again. Where Adam Przeworski and his colleagues use that rotation, or what Bernard Manin terms the renewal of consent, as the operational definition of democracy, the populist impulse is toward a plebiscitary affirmation of the true will of the people.

Stable democracies require an internalization of politics as repeat play. Populist elections claim a mandate from the people beyond choosing officeholders. Elections over mandates risk the same repudiation of institutional accommodation of divisions as do plebiscites. It is not that populism is plebiscitary as such; rather, neither is well suited to institutionalized politics that presume deliberation, procedural order, and accommodation. For both plebiscites and populism, the election defines the agenda. Period.

In my monograph on *Fragile Democracies*, I devote considerable attention to the distinct frailties of new democracies as they emerge from conflict or an autocratic past. One of the defining characteristics is that the complete package of democratic institutions rarely mature together, or quickly. Democracy proves to be a complicated interaction between popular sovereignty, political competition, stable institutions of state, vibrant organs of civil society, meaningful political intermediaries and a commitment to the idea that the losers of today have a credible chance to reorganize and perhaps emerge as the winners of tomorrow. Few if any of these criteria are likely to be satisfied amid the birth pangs of a new democratic order.

With few exceptions, what emerges is executive rule. It is far easier to elect the national savior than it is to forge political parties and legislative competence. Such rulers have a propensity to identify themselves with the struggle of the people, often with justification when a despot has been toppled, and an unfortunate identification of their continued rule with the fruition of the popular will. Not for nothing the cynical British account of post-colonial rule: "one man, one vote, one time." These rulers share with populism, in Müller's words, the desire "to cut out the middleman ... and to rely as little as possible on complex party organizations as intermediaries between citizens and politicians." As power consolidates, a web of cronyism, corruption and clientelism reinforces the relation between the hypertrophic executive and any claim to government benefits, contracts, or favors.

My primary argument in *Fragile Democracies* was that courts can forestall this descent into executive command, and indeed have done so, at least for a period of time. It is doubtful that courts can hold out for long if the

institutions of democratic governance do not take root. But courts can provide a respite, frustrating political exclusions in the form of lustrations, ensuring the ability of dissident parties to operate, and most significantly, reinforcing a separation of powers to limit the executive.

While nascent democracies are prone to fragility, the current populist wave forces an uncomfortable confrontation with the prospect that all democracies are also vulnerable, at least episodically. The one-partyism of a commanding central presence is characteristic of new regimes, but it may be a risk in all democracies. Unlike the challenges of fascism or communism, or of military overthrows in Latin America, the problem is not a rejection of democracy, but too much democracy. Or, more precisely, the risk is democracy unbounded from institutional constraints on what the temporal majority may do. If democracy should be defined by the capacity of the losers of today to prevail tomorrow, then the struggle against holism requires the safeguarding of democratic institutions. The descent into dominant leader control in the established democracies echoes the frailty of new democracies.

Consider this account of contemporary politics:

*What we are seeing in the presidential campaigns ... is that the more chance the candidates have of winning — or the more chance they think they have of winning — the more they are prepared to play the game that I call “national presidentialism”. They go in for speeches that amount to saying: “If I’m elected, then everything ... is going to be different because I’m the only one able to lead this country”.... All that matters is how the candidate is going to be able to restore [the nation’s] image once he or she has been given supreme power.*

Certainly this characterization of contemporary politics would echo around the world. Perhaps the most striking feature of the last U.S. presidential election was the repeated claim by candidate Trump that he, and he alone, could chart a new path forward. In my native Argentina, such “caudillo politics” have generally been the mark of the demise of democracy rather than its fulfillment. The quoted statement comes not from Argentina or the U.S., but from France, and with some irony, the speaker is Daniel Cohn-Bendit, the leader of the 1968 student uprising.

If populism is at bottom anti-institutional, plebiscitary, and opposed to the give-and-take of ordinary democratic politics, what of the courts in advanced democracies facing populist insurgencies? Brexit offers an instructive example. The ill-considered referendum was a desperate gambit by a weak prime minister to compensate for lack of parliamentary support through a direct appeal to the population. Prime Minister Cameron, like many failing politicians, misjudged the times and was repudiated by the voters. Cameron quickly departed the scene and a chastened Tory government formed under Prime Minister Theresa May.

Unable or unwilling to resist the wave of populist anger, the new government announced its intention to implement the Brexit vote as the voice of the people. The result was an attempt to disentangle Britain from the EU by executive fiat. This provoked a [major legal challenge in the UK Supreme Court](#), now formally disengaged from the House of Lords. The case prompted a remarkable discussion on the nature of British democratic governance and the importance of institutional order. The inquiry was thus:

*[The] Act envisages domestic law, and therefore rights of UK citizens, changing as EU law varies, but it does not envisage those rights changing as a result of ministers unilaterally deciding that the United Kingdom should withdraw from the EU Treaties.<sup>1</sup> R v Secretary of State [2017] UKSC*

That a weak government had appealed directly over the head of Parliament to enraged voters did not alter the institutional commitments to the democratic supremacy of Parliament. Nor could the Prime Minister invoke plebiscitary approval as a substitute for proper institutional process:

*The question is whether that domestic starting point, introduced by Parliament, can be set aside, or could have been intended to be set aside, by a decision of the UK executive without express Parliamentary authorisation. We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation. This conclusion appears to us to follow from the ordinary application of basic concepts of constitutional law to the present issue.*

This is precisely the role courts should play in serving to reinforce the constitutional constraints necessary for democratic governance.

Around the world, populist regimes attempt to curtail any challenge to executive authority. In Poland the current form includes an attack on judicial independence; in Hungary it even includes the attempt to expel the entire Central European University; and in South Africa it includes President Zuma's efforts to hand-pick government officials ranging from ministers to chief justice of the Constitutional Court, to anti-corruption enforcers. In each case, the overweening executive appeals to the plebiscitary authority of his own election.

Rule of law principles may serve to hold back the more worrisome manifestations of populist anger. Courts are a vital actor in this process, although at considerable risk. When the judiciary acts to constrain the political branches it necessarily raises the issue of its lack of democratic mandate, the perennial countermajoritarian dilemma. In the resulting conflict, the courts themselves become the focus of renewed populist outrage. In some countries, as in Hungary and increasingly Poland, the institutions may be overwhelmed by the concerted forces of politics. But they can provide a necessary challenge and an avenue of repair. In the words of the U.S. court confronting the Trump Administration's proposed travel bans and the Administration's claims to unaccountable executive discretion:

*There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy.... [T]he Government's 'authority and expertise in [such] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals,' even in times of war . . . [Our cases] make clear, courts can and do review constitutional challenges to the substance and implementation of immigration policy.<sup>2</sup>* *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam).

## References [ + ]

1. ↑ R v Secretary of State [2017] UKSC
2. ↑ Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (per curiam).

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